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10 *Attorneys for Defendant, Counterclaimant,*
11 *and Cross-Claimant Executive Risk Specialty*
12 *Insurance Company*

13 UNITED STATES DISTRICT COURT
14 NORTHERN DISTRICT OF CALIFORNIA
15 OAKLAND DIVISION

16 LENSRAFTERS, INC., and EYEXAM OF
17 CALIFORNIA, INC.,

18 Plaintiffs,

19 v.

20 LIBERTY MUTUAL FIRE INSURANCE
COMPANY; EXECUTIVE RISK SPECIALTY
21 INSURANCE COMPANY; UNITED STATES
FIRE INSURANCE COMPANY; MARKEL
22 AMERICAN INSURANCE COMPANY and
WESTCHESTER FIRE INSURANCE
23 COMPANY,

24 Defendants.

25 AND RELATED CROSS AND COUNTER
26 ACTIONS

No. C07-02853 SBA

[Related Case No. C 04-01001 SBA]

**DEFENDANT EXECUTIVE RISK
SPECIALTY INSURANCE
COMPANY'S ANSWER TO FIRST
AMENDED COMPLAINT**

1 Defendant, Counterclaimant, and Cross-Complainant Executive Risk Specialty Insurance
2 Company ("ERSIC"), by and through its counsel, answers Plaintiffs' First Amended Complaint
3 ("FAC") in this action, as follows:

4 1. The first and second sentences of Paragraph 1 of the FAC are ambiguous or
5 incomplete, or purport to characterize the insurance policies at issue and the coverage provided
6 thereunder, which the terms of those policies speak for themselves. On these bases, ERSIC
7 denies the allegations in the first two sentences of Paragraph 1 of the FAC. The last sentence of
8 Paragraph 1 of the FAC states a legal conclusion as to which no response is required.

9 2. With respect to the first sentence of Paragraph 2 of the FAC, ERSIC denies the
10 allegations as they relate to ERSIC. ERSIC lacks sufficient knowledge or information to respond
11 to the remaining allegations in the first sentence of Paragraph 2 of the FAC, and on that basis,
12 denies the allegations. ERSIC admits the allegations in the second and third sentences of
13 Paragraph 2 of the FAC. The allegations in the fourth sentence of Paragraph 2 of the FAC are too
14 vague and incomplete to permit a response and on that basis, ERSIC denies the allegations in that
15 sentence.

16 3. ERSIC denies the allegations in Paragraph 3 of the FAC as they relate to ERSIC.
17 ERSIC lacks sufficient knowledge or information to respond to the remaining allegations in
18 Paragraph 3 of the FAC, and on that basis, denies the allegations.

19 4. ERSIC admits the allegations in the first sentence of Paragraph 4 of the FAC.
20 With respect to the second sentence of Paragraph 4 of the FAC, that sentence purports to
21 characterize the present action, to which no response is required. To the extent a response is
22 required, ERSIC denies that the LensCrafters is entitled to the relief it seeks as to ERSIC.

23 5. Upon information and belief, ERSIC admits the allegations in Paragraph 5 of the
24 FAC.

25 6. Upon information and belief, ERSIC admits the allegations in Paragraph 6 of the
26 FAC.

27 7. Upon information and belief, ERSIC admits the allegations in Paragraph 7 of the
28 FAC.

1 8. ERSIC admits that it is a Connecticut corporation, but denies that its principal
2 place of business is Connecticut.

3 9. Upon information and belief, ERSIC admits the allegations in Paragraph 9 of the
4 FAC.

5 10. Upon information and belief, ERSIC admits the allegations in Paragraph 10 of the
6 FAC.

7 11. Upon information and belief, ERSIC admits the allegations in Paragraph 11 of the
8 FAC.

9 12. ERSIC admits the allegations in Paragraph 12 of the FAC.

10 13. Paragraph 13 states a legal conclusion to which no response is required. To the
11 extent that a response is required, ERSIC admits that venue is proper in the Northern District of
12 California.

13 14. With respect to the first sentence in Paragraph 14 of the FAC, ERSIC admits that it
14 issued to EyeMed Vision Care, LLC, Managed Care Organization Errors and Omissions Liability
15 Policy No. 8167-2076 to LensCrafters and Eyexam for the November 12, 2001 to November 12,
16 2002 Policy Period (the "ERSIC Policy") and that the remaining defendants issued insurance
17 policies to LensCrafters and Eyexam. The remaining allegations in the first sentence of
18 Paragraph 14 of the FAC are ambiguous or incomplete, or purport to characterize the defendants'
19 policies, which terms speak for themselves, and on these bases, ERSIC denies the remaining
20 allegations in the first sentence of Paragraph 14 of the FAC. The second sentence of Paragraph
21 14 of the FAC is not a factual allegation, and as such, no response is required.

22 15. ERSIC denies the allegations in Paragraph 15 of the FAC as they relate to ERSIC.
23 ERSIC lacks sufficient knowledge or information to respond to the remaining allegations in
24 Paragraph 15 of the FAC, and on that basis, denies the allegations.

25 16. Upon information and belief, ERSIC admits the allegations in Paragraph 16 of the
26 FAC.

27 17. Upon information and belief, ERSIC admits the allegations in Paragraph 17 of the
28 FAC, except to deny that the allegations fully and completely set forth the terms of the Liberty

1 Policies, and further denies that Policy No. TB2-681-004130-038 has an applicable \$3 million
2 limit of liability “for each occurrence.”

3 18. With respect to the allegations in Paragraph 18 of the FAC, ERSIC admits that it
4 issued Managed Care Organization Errors and Omissions Liability Policy No. 8167-2076 to
5 Eyexam and LensCrafters for the November 12, 2001 to November 12, 2002 Policy Period. The
6 remaining allegations in Paragraph 18 of the FAC contain characterizations of the coverage
7 afforded under the ERSIC Policy and do not fully and accurately describe the terms and
8 conditions of the ERSIC Policy. ERSIC states that the terms of the ERSIC Policy speak for
9 themselves, and on these bases, denies the remaining allegations in Paragraph 18 of the FAC.

10 19. The allegations in Paragraph 19 of the FAC contain characterizations of the
11 coverage afforded under the ERSIC Policy. ERSIC denies that Paragraph 19 of the FAC fully
12 and accurately describes the terms and conditions of the ERSIC Policy. ERSIC states that the
13 terms of the ERSIC Policy speak for themselves, and on these bases, denies the allegations in
14 Paragraph 19 of the FAC.

15 20. Upon information and belief, ERSIC admits the allegations in Paragraph 20 of the
16 FAC.

17 21. The allegations in Paragraph 21 of the FAC contain characterizations of the
18 coverage afforded under the U.S. Fire Policies. ERSIC denies that Paragraph 21 of the FAC fully
19 and accurately describes the terms and conditions of the U.S. Fire Policies. ERSIC states that the
20 terms of the U.S. Fire Policies Policy speak for themselves, and on these bases, deny the
21 allegations in Paragraph 21 of the FAC.

22 22. Upon information and belief, ERSIC admits the allegations in Paragraph 22 of the
23 FAC.

24 23. The allegations in Paragraph 23 of the FAC contain characterizations of the
25 coverage afforded under the Markel Policy. ERSIC denies that Paragraph 23 of the FAC fully
26 and accurately describes the terms and conditions of the Markel Policy. ERSIC states that the
27 terms of the Markel Policy speak for themselves, and on these bases, deny the allegations in
28 Paragraph 23 of the FAC.

24. Upon information and belief, ERSIC admits the allegations in the first sentence of Paragraph 24 of the FAC. The remaining allegations in Paragraph 24 of the FAC contain characterizations of the coverage afforded under the Westchester Excess Policy. ERSIC denies that the remaining allegations in Paragraph 24 of the FAC fully and accurately describe the terms and conditions of the Westchester Excess Policy. ERSIC states that the terms of the Westchester Excess Policy speak for themselves, and on these bases, denies the remaining allegations in Paragraph 24 of the FAC.

25. Upon information and belief, ERSIC admits the allegations in Paragraph 25 of the FAC.

26. The allegations in Paragraph 26 of the FAC contain characterizations of the coverage afforded under the Westchester Policies. ERSIC denies that Paragraph 26 of the FAC fully and accurately describes the terms and conditions of the Westchester Policies. ERSIC states that the terms of the Westchester Policies speak for themselves, and on these bases, deny the allegations in Paragraph 26 of the FAC.

27. ERSIC admits the allegations in Paragraph 27 of the FAC.

28. With respect to the first sentence in Paragraph 28 of the FAC, ERSIC denies that LensCrafters has fully and accurately set forth the contents of the FAC in the *Snow* Action, and as such, denies the allegations. With respect to second sentence in Paragraph 28 of the FAC, ERSIC admits the allegations.

29. With respect to the first and second sentences in Paragraph 29 of the FAC, ERSIC denies that it received timely notice of the *Snow* Action, but admits the remaining allegations. With respect to the allegations in the third sentence of Paragraph 29 of the FAC as they relate to Liberty, ERSIC admits that Liberty agreed to pay defense costs for LensCrafters for the *Snow* Action under a reservation of rights. With respect to the allegations in the third sentence of Paragraph 29 of the FAC as they relate to ERSIC, the FAC does not fully and accurately describe the reservation of rights asserted by ERSIC, which terms speak for themselves. On this basis, ERSIC denies the remaining allegations in the third sentence of Paragraph 29 of the FAC.

30. ERSIC admits the allegations in Paragraph 30 of the FAC.

1 31. ERSIC admits the allegations in Paragraph 31 of the FAC.

2 32. ERSIC admits the allegations in Paragraph 32 of the FAC.

3 33. With respect to the first sentence of Paragraph 33 of the FAC, ERSIC denies that
4 LensCrafters has fully and accurately set forth the contents of the November 22, 2005 Amended
5 Judgment, which states that Liberty Mutual has a duty to defend the *Snow* Action under the six
6 Liberty Policies, and that because the ERSIC Policy “is excess to the Liberty policies with respect
7 to the *Snow* action,” ERSIC’s “duty to defend the Plaintiffs in the *Snow* action will not arise
8 unless and until the Liberty policies are exhausted or Liberty’s duty to defend is otherwise
9 extinguished.” ERSIC admits the allegations in the second sentence of Paragraph 33 of the FAC.

10 34. ERSIC lacks sufficient knowledge or information to respond to the allegations in
11 Paragraph 34 of the FAC, and on that basis, denies the allegations.

12 35. With respect to first sentence of Paragraph 35 of the FAC, ERSIC admits that a
13 mediation was held on July 26, 2007. ERSIC denies that the characterization of the purpose of
14 that mediation appearing in the first sentence of Paragraph 35 of the FAC is complete and
15 accurate, and on that basis, denies the allegation. The remaining allegations in Paragraph 35 of
16 the FAC are admitted.

17 36. With respect to first sentence of Paragraph 36 of the FAC, ERSIC admits the
18 allegations. With respect to the second sentence of Paragraph 36 of the FAC, ERSIC admits that
19 LensCrafters requested that ERSIC contribute its remaining policy limits to fund a settlement in
20 the *Snow* Action. ERSIC denies that it refused to contribute its remaining policy limits to fund a
21 settlement in the *Snow* Action. With respect to the remaining allegations in the second sentence
22 of Paragraph 36 of the FAC, ERSIC is without sufficient knowledge or information to form a
23 belief as to the truth of the allegations and on that basis, denies the remaining allegations.

24 37. With respect to first and second sentences of Paragraph 37 of the FAC, ERSIC
25 denies that it has refused to contribute its remaining policy limits to fund a settlement in the *Snow*
26 Action. With respect to the remaining allegations in the first and second sentences of Paragraph
27 37 of the FAC, ERSIC is without sufficient knowledge or information to form a belief as to the
28

1 truth of the allegations and on that basis, denies the remaining allegations. ERSIC admits the
2 allegations in the last sentence of Paragraph 37 of the FAC.

3 38. ERSIC denies the allegations in Paragraph 38 of the FAC as they relate to ERSIC.
4 ERSIC is without sufficient knowledge or information to form a belief as to the truth of the
5 remaining allegations and on that basis, denies the remaining allegations.

6 39. ERSIC repeats and incorporates its responses to Paragraphs 1–38 of the FAC.

7 40. With respect to the first sentence of Paragraph 40 of the FAC, ERSIC denies the
8 allegations. The second sentence of Paragraph 40 of the FAC states a legal conclusion, and as
9 such, no further response is required.

10 41. With respect to the first sentence of Paragraph 41 of the FAC, ERSIC denies the
11 allegations as they relate to ERSIC. ERSIC is without sufficient knowledge or information to
12 form a belief as to the truth of the remaining allegations in the first sentence of Paragraph 41 of
13 the FAC, and on that basis, denies the remaining allegations. With respect to the second and third
14 sentences of Paragraph 41 of the FAC, ERSIC denies that the Policyholders are entitled to the
15 declaration they seek as to ERSIC.

16 42. ERSIC admits the allegations in Paragraph 42 of the FAC.

17 43. ERSIC repeats and incorporates its responses to Paragraphs 1–38 of the FAC.

18 44. The first and second sentences of Paragraph 44 of the FAC state a legal
19 conclusion, and as such, no further response is required. ERSIC is without sufficient knowledge
20 or information to form a belief as to the truth of the allegations in the third sentence of Paragraph
21 44 of the FAC, and on that basis, denies the allegations in that sentence. With respect to the
22 fourth sentences of Paragraph 44 of the FAC, ERSIC admits that at the July 26, 2007 mediation,
23 LensCrafters asked ERSIC to consent to a settlement in the *Snow* Action and contribute its
24 remaining policy limits. ERSIC is without sufficient knowledge or information to form a belief
25 as to the truth of the remaining allegations in the fourth sentence of Paragraph 44 of the FAC, and
26 on that basis, denies the remaining allegations in that sentence. With respect to the fifth sentence
27 of Paragraph 44, ERSIC denies the allegations as to ERSIC. ERSIC is without sufficient
28 knowledge or information to form a belief as to the truth of the remaining allegations in the fifth

1 sentence of Paragraph 44 of the FAC, and on that basis, denies the remaining allegations in that
2 sentence. ERSIC denies the allegations in the last sentence of Paragraph 44 as they relate to
3 ERSIC.

4 45. With respect to the allegations in Paragraph 45 of the FAC, ERSIC denies the
5 allegations as they relate to ERSIC. ERSIC is without sufficient knowledge or information to
6 form a belief as to the truth of the remaining allegations in Paragraph 45 of the FAC, and on that
7 basis, denies the remaining allegations.

8 46. With respect to the allegations in Paragraph 46 of the FAC, these allegations are
9 not made against ERSIC, and thus a response is not required.

10 47. With respect to the allegations in Paragraph 47 of the FAC, these allegations are
11 not made against ERSIC, and thus a response is not required.

12 48. With respect to the allegations in Paragraph 48 of the FAC, these allegations are
13 not made against ERSIC, and thus a response is not required.

14 49. With respect to the allegations in Paragraph 49 of the FAC, these allegations are
15 not made against ERSIC, and thus a response is not required.

16 50. With respect to the allegations in Paragraph 50 of the FAC, these allegations are
17 not made against ERSIC, and thus a response is not required.

18 51. With respect to the allegations in Paragraph 51 of the FAC, these allegations are
19 not made against ERSIC, and thus a response is not required.

20 52. With respect to the allegations in Paragraph 52 of the FAC, these allegations are
21 not made against ERSIC, and thus a response is not required.

22 53. With respect to the allegations in Paragraph 53 of the FAC, these allegations are
23 not made against ERSIC, and thus a response is not required.

24 54. Each and every allegation of the FAC not expressly admitted herein is denied.

25 **FIRST AFFIRMATIVE DEFENSE**

26 The Complaint fails to state a claim against ERSIC upon which relief may be granted.
27
28

1 **SECOND AFFIRMATIVE DEFENSE**

2 Plaintiffs' claim is barred or limited by operation of Policy Endorsement No. 11, which
3 provides that the ERSIC Policy "shall be excess of and shall not contribute with: (a) Commercial
4 General Liability Insurance Policy No RG2-681-004130-031 issued by Liberty or any renewal or
5 replacement thereof, but only with respect to **Managed Care Activities**; (b) any other existing
6 insurance or self-insurance, unless such other insurance or self-insurance is specifically stated to
7 be in excess of this Policy; and (c) any indemnification to which an **Insured** is entitled from any
8 entity other than the **Insured Entity**."

9 **THIRD AFFIRMATIVE DEFENSE**

10 Plaintiffs' claim is barred or limited because ERSIC's obligation, if any, to indemnify
11 Plaintiffs for the *Snow* Action does not arise unless and until the applicable limits of liability
12 available under the underlying Liberty Policies are exhausted.

13 **FOURTH AFFIRMATIVE DEFENSE**

14 Plaintiffs' claim is barred or limited by the doctrines of res judicata, law of the case,
15 and/or collateral estoppel, by reason of the findings, orders and judgments entered in the action
16 captioned *LensCrafters, Inc., et al. v. Liberty Mut. Fire Ins. Co., et al.*, No. C 04-1001 SBA (N.D.
17 Cal.).

18 **FIFTH AFFIRMATIVE DEFENSE**

19 Plaintiffs' claim is barred or limited by the doctrines of equitable contribution and/or
20 equitable indemnity.

21 **SIXTH AFFIRMATIVE DEFENSE**

22 Plaintiffs' claim is barred or limited by operation of law holding that ERSIC's duty as an
23 excess insurer to indemnify is only triggered once the applicable Liberty Policies are exhausted.

24 **SEVENTH AFFIRMATIVE DEFENSE**

25 Plaintiffs' claim against ERSIC is barred or limited to the extent ERSIC's policy limits
26 have been depleted or exhausted through the payment of Claims.

EIGHTH AFFIRMATIVE DEFENSE

Plaintiffs' claim is barred or limited by operation of Policy Section II(J)(2), which excludes coverage for "matters which are uninsurable under applicable law."

NINTH AFFIRMATIVE DEFENSE

Plaintiffs' claim is barred by the doctrines of estoppel and waiver.

TENTH AFFIRMATIVE DEFENSE

Plaintiffs' claim is barred or limited to the extent that Plaintiffs' own action, or the actions of any third party, including the defendants in this lawsuit other than ERSIC, diminished Plaintiffs' right to the relief sought in the Complaint.

ELEVENTH AFFIRMATIVE DEFENSE

Plaintiffs' claims are barred by the doctrine of unclean hands.

TWELFTH AFFIRMATIVE DEFENSE

Plaintiffs' claims are barred or limited by operation of Policy Section III(A)(1), which excludes coverage for "**Loss from any Claim** brought about or contributed to in fact by: (1) any willful misconduct or dishonest, fraudulent, criminal or malicious act, error or omission by any **Insured.**"

THIRTEENTH AFFIRMATIVE DEFENSE

Plaintiffs' claims are barred or limited by operation of Policy Section III(A)(2), which excludes coverage for "**Loss from any Claim** brought about or contributed to in fact by: ... (2) any willful violation by any **Insured** of any law, statute, ordinance, rule or regulation."

FOURTEENTH AFFIRMATIVE DEFENSE

Plaintiffs' claims are barred or limited by operation of Policy Section III(A)(3), which excludes coverage for "**Loss from any Claim** brought about or contributed to in fact by: ... (3) any **Insured** gaining any profit, remuneration or advantage to which such **Insured** was not legally entitled."

FIFTEENTH AFFIRMATIVE DEFENSE

Plaintiffs' claims are barred or limited by operation of Policy Section II(J)(1), which excludes coverage for "fines, penalties, taxes, and punitive, exemplary or multiplied damages."

SIXTEENTH AFFIRMATIVE DEFENSE

Plaintiffs' claims are barred or limited by operation of Policy Section II(J)(2), which excludes coverage for "non-monetary relief or redress in any form, including without limitation the cost of complying with any injunctive, declaratory or administrative relief."

SEVENTEENTH AFFIRMATIVE DEFENSE

Coverage for any "Additional Insureds" is barred or limited by operation of Policy Endorsement No. 5, which limits coverage "to any actual or alleged act, error or omission in the performing of, or failure to perform, Managed Care Organization Business Activities by any Insured other than an Additional Insured."

EIGHTEENTH AFFIRMATIVE DEFENSE

To the extent that the application or negotiations for the Policy included materially false, inaccurate, incomplete, or otherwise misleading statements, representations or omissions, ERSIC would be entitled to a declaration that the Policy is *void ab initio*.

NINETEENTH AFFIRMATIVE DEFENSE

Plaintiffs' claims are barred to the extent Plaintiffs seek to recover amounts within the retention of the Policy.

TWENTIETH AFFIRMATIVE DEFENSE

The defenses set forth herein reflect ERSIC's assessment based on the information of which ERSIC is currently aware. ERSIC expressly reserves, and does not waive any defenses to coverage under applicable law and the Policy, regardless of when such defenses to coverage may have arisen or may arise.

WHEREFORE, ERSIC prays for judgment as follows:

1. That the Court enter judgment in ERSIC's favor and against Plaintiffs;
2. That Plaintiffs take nothing by their Complaint against ERSIC;
3. That the Court award ERSIC the costs of this litigation; and
4. For such other and further relief as the Court deems just and proper.

1 Date: October 19, 2007

Respectfully submitted,

2 ROSS, DIXON & BELL, LLP

3
4 /s/ Terrence R. McInnis
Terrence R. McInnis

5 and

6 Monique M. Fuentes
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8 *Cross-Complainant Executive Risk Specialty*
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